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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 SADIQ SAIBU,

11
12 Petitioner,

13 vs.

14 BRENDA M. CASH, Warden,

15 Respondent.
16

Civil No. 10cv0844-CAB

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

[Doc. No. 1]

17 **I. INTRODUCTION**

18 Sadiq Saibu (hereinafter “Petitioner” or “Saibu”), a state prisoner proceeding pro se, has
19 filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his San Diego
20 County Superior Court conviction in case number SCD195049 of one count of conspiracy to commit
21 robbery, one count of false imprisonment, three counts of robbery, and two counts of unlawful
22 driving or taking of a vehicle. (Lodgment No. 1, 665-67.) Petitioner contends his federal
23 constitutional rights were violated because 1) the trial court improperly excluded third-party
24 exculpatory evidence of other robberies, 2) the accomplice jury instruction lessened the
25 prosecution’s burden of proof, 3) there was insufficient evidence to corroborate accomplice
26 testimony, and 4) the trial court improperly sentenced him to a consecutive sentence on count two.
27 (Petition [“Pet.”] at 6-9; Exhibit 1 at 1-3.)

28 The Court has considered the Petition and Exhibit, Respondent’s Answer and Memorandum

1 of Points and Authorities in Support thereof (hereinafter “Respt’s Mem.”), Petitioner’s Traverse, and
 2 all the supporting documents submitted by the parties. Based upon the documents and evidence
 3 presented in this case, and for the reasons set forth below, the Court **DENIES** the Petition.

4 **II. PROCEDURAL BACKGROUND**

5 On August 21, 2006, the District Attorney of San Diego County, California filed a Second
 6 Amended Consolidated Information (“Information”) with regard to three bank robberies - the August
 7 13, 2005, Wells Fargo Bank robbery on El Cajon Boulevard, the August 19, 2005, World Savings
 8 Bank robbery in La Mesa, and the August 29, 2005, Wells Fargo Bank robbery on Black Mountain
 9 Road - charging Petitioner¹ with one count of conspiracy to commit bank robbery, a violation of
 10 California Penal Code (“Penal Code”) section 182(a)(1) (count one); one count of kidnapping for
 11 robbery, a violation of Penal Code section 209(b)(1) (count two); three counts of robbery, a violation
 12 of Penal Code section 211 (count three [August 13 Wells Fargo Bank robbery], count six [August 19
 13 World Savings Bank robbery], and count nine [August 29 Wells Fargo Bank robbery]; three counts
 14 of unlawful taking and driving a vehicle, a violation of California Vehicle Code section 10851
 15 (counts four, seven, and eleven); and one count of assault with a firearm, a violation of Penal Code
 16 section 245(a)(2) (count ten). (Lodgment No. 1 at 30-44.) It was further alleged that as to the
 17 kidnapping and robbery charges, Petitioner personally used a firearm, a violation of Penal Code
 18 section 12022.53(b) (counts two, three, six and nine). (*Id.*)

19 Following trial, Saibu was convicted of: (1) conspiracy to commit bank robbery (count one);
 20 (2) false imprisonment (Penal Code § 236) as a lesser included offense of count two (kidnapping for
 21 robbery), with the jury deadlocked on the personal use of a firearm allegation; (3) robbery (count
 22 three), with the jury deadlocked on the personal use of a firearm allegation ; (4) robbery (count six),
 23 with the jury deadlocked as to the personal use of a firearm allegation; (5) unlawful taking and
 24 driving of a vehicle (count seven); (6) robbery (count nine), with a true finding on the personal use of
 25 a firearm allegation (§12022.53(b)); and (7) assault with a firearm (count ten), with a true finding on
 26 the armed with a firearm allegation (§12022(a)(1). (Lodgment No. 1, 665-677.) The jury found
 27

28 ¹ The Information also charged Antonio Valentino, Michael Jerome Squire, Keith Anthony Coleman,
 DeWayne Cummings, Jr., and Ken Buckley in connection with the robberies. (Lodgment No. 1 at 31.)

Petitioner not guilty of kidnapping for robbery (count two). (Id. at 670-71.)

On February 9, 2007, the trial court sentenced Saibu to a total state prison term of sixteen years and four months, consisting of a three-year midterm on count nine, a consecutive ten year term for the firearm enhancement allegation related to that count, consecutive eight month terms on counts two and seven², and consecutive one-year terms on counts three and six. (Lodgment No. 1 at 545-46,682.) The court stayed execution on the remaining counts and allegations under section 654. (Id. at 545.)

Saibu appealed his conviction to the California Court of Appeal for the Fourth Appellate District, Division One. (Lodgment No. 3.) On January 14, 2009, the Court of Appeal modified the restitution award and otherwise affirmed the judgment. (Lodgment No. 6.) Petitioner filed a petition for review in the California Supreme Court, which was denied without citation of authority on April 15, 2009. (Lodgment Nos. 7-8.)

On April 19, 2010, Petitioner filed the instant petition for writ of habeas corpus with this Court. [ECF No. 1.] The parties consented to Magistrate Judge jurisdiction. [ECF Nos. 1,10.] On August 30, 2010, Respondent filed an Answer. [ECF No. 11.] Petitioner filed a Traverse on October 15, 2010. [ECF No. 15.]

III. FACTUAL BACKGROUND

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see also Parke v. Raley, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness). The facts as found by the state appellate court are as follows:

A. The People's Evidence

1. August 13 Wells Fargo Bank Robbery on El Cajon Boulevard

At around 9:15 a.m. on August 13, Lucy Verduzco went to the Wells Fargo Bank on El Cajon Boulevard in San Diego to make a deposit. As she was leaving the bank through the south doors, a gray or light blue medium-sized, four-door car sped

² The abstract of judgment incorrectly lists Petitioner's last name as "Salbu" instead of "Saibu" and inaccurately reflects an eight- *year* term rather than eight- *month* term on count seven. (Lodgment No. 1 at 00545-46.) In addition, the abstract does not reflect the three-year midterm on count nine. (Id.)

1 into the parking lot and stopped in front of her. Three armed African-American men
2 got out of the car. All three were dressed in dark clothing; they were wearing hooded
sweatshirts and bandanas.

3 The three men ran up to Verduzco, and the driver of the car ordered her to go
4 back into the bank. Verduzco complied.

5 The men ran into the bank through the south door. Two had shotguns or
rifles; the other had an AK-47. They pointed the weapons at everyone in the bank and
6 ordered everyone to get down on the ground. One of the men went down the teller
line, pointing his weapon at each teller, saying, "Give me the [motherfucking] money.
7 Hurry up. Give it to me now." Two of the tellers handed the man cash from their
drawers. The man put the bundles of cash into a black bag. One of the tellers pressed
8 the silent alarm.

9 A second man waved a gun in the face of Jonahan Dadbin, trying to get him to
open the security door to the teller windows and vault room, and demanded in an
10 aggressive fashion that Dadbin open the door. Dadbin refused.

11 After a few minutes, the three men left the bank through the south door and
got into a light-colored car. As the men fled the scene in the car, one of the bank
employees wrote down a partial license plate number. Michael Miranda, a San Diego
12 Police Department patrol officer, responded to the call regarding the robbery and
searched the surrounding area for a vehicle matching the description given by
13 witnesses. At around 10:00 a.m., he found a gray, two-door Acura parked about two
blocks south of the Wells Fargo Bank. The front and rear passenger doors were open.
14 Officer Miranda impounded the vehicle.

15 2. August 19 World Savings Bank robbery in La Mesa

16 On August 19, between 8:00 and 8:15 a.m., Javier Banuelos Venegas drove
his purple 1995 Ford Windstar minivan carrying California license plate No.
17 5CMW218 to a Shell gas station and minimart in National City. Banuelos pulled into
the parking lot, left his keys in the ignition with the engine running, and went inside
18 the minimart to buy a cup of coffee. When he returned to the parking lot, Banuelos
found his minivan was gone.

19 Later that morning, at around 9:20 a.m., Banuelos's minivan pulled into the
parking lot of the World Savings Bank located on Lake Murray Boulevard in La Mesa
20 and stopped with its rear facing the employee break room. Three African-American
men, including the driver, got out of the van. The men were wearing dark blue and
21 black clothing consisting of sweatpants, hooded sweatshirts and bandanas. One of
them wore a medium to dark blue sweatsuit with golf raglan sleeves, black shoes, and
22 a brown and white bandanna. Another man was wearing gloves which were cut off at
the knuckles. All three men were carrying shotguns or rifles. One of the men was
23 similar in skin color, height and built[sic] to Valentino. Another was about the same
height and build as Saibu.

24 The men entered the bank holding their weapons. One said, "This is a
25 robbery. Everybody get down on the ground." One of the customers who was on the
phone told the person on the other end of the line that a robbery was in progress and
26 to call the police.

27 One of the armed men jumped on the teller counter, went to where the tellers
were standing, and opened the security door for the other two armed men, who
28 walked down the inside of the teller line in opposite directions. One of the men

opened the teller drawers, removing the cash from the drawers and placing it in a duffel bag. One directed Jeanene Krahling, the bank's vault teller, to get the keys to the vault. After Krahling got the keys, the man held his gun to her head and told her to hurry up. She preceded him into the vault, pulled out the locker tray, and he grabbed the money from the tray. The man put the money in a black bag, thanked Krahling, and exited the vault. As all three men were leaving the bank, one of them said, "Have a nice day." The men took \$14,905 during the robbery.

La Mesa police officers responding to the call about the robbery found Banuelos's minivan parked about three blocks away from the bank. One of the vehicle's sliding doors was open.

3. *August 29 Wells Fargo Bank robbery on Black Mountain Road*

On August 29, at around 7:00 a.m., DeWayne Cummings, Sr. (Cummings Sr.) was getting ready for work when he heard a car horn across the street. He looked outside and saw a white, box-shaped car. He woke up his son, DeWayne Cummings, Jr. (Cummings), and opened the front door to allow in Saibu, who was one of his son's friends. Cummings Sr. saw Kinsel sitting on the couch. Saibu had been to the house several times.

Later that morning, at around 9:30 a.m., three African-American men armed with rifles and wearing dark clothing, hooded sweatshirts and bandannas entered the Wells Fargo Bank on Black Mountain Road in Mira Mesa. One was carrying a duffel bag. One said, "You're being robbed. This is a robbery." Cristina Rantael, the bank's service manager pressed the silent alarm.

One of the men jumped over the teller counter and let the other two men in through the security door. One man went down the teller line, opened all the registers, took the money, and put it in a bag.

One of the men told Rantael to open the main vault. Rantael asked teller Cyrus Safa, who had the keys, to go with them to the vault. Branch manager Marian Tyler also went with them after one of the men pointed a rifle at her head and ordered her to open the security door leading to the vault room.

As Rantael was trying to open the vault door, one of the men held his rifle to her head, started counting backwards, and stopped counting when he reached two because Rantael opened the door. One of the men grabbed the money from the vault and yelled to another to get the "moneybag." The man put his gun under his arm and put the money into a duffel bag. The money that the men took contained dye packs that explode with tear gas and red dye.

The men ran out of the bank and got into a silver Mazda 626. On their way out, one said, "Have a nice day."

After the men left the bank, the dye packs exploded. When police responded to the scene, they found a medium size duffel bag in the parking lot that contained \$82,133. The money in the bag was stained with red dye and smelled like tear gas.

At around 10:00 a.m. that same morning, August 29, Elliott Woodward, a college student, was sitting in his parked car on a side street near Mira Mesa Boulevard. Woodward saw people wearing dark clothing get out of a small white car, run across the street, and get into a small red car, which then drove past Woodward's car. Finding their behavior suspicious, Woodward wrote down the license plate

1 number of the red car, then walked over to the white car. The engine was still
2 running, the doors were open, and it appeared to have been hotwired. Woodward
3 flagged down a passing police car. An officer impounded the white car, which was a
4 Mazda 626.

5 In the afternoon on August 30, James McGhee, a detective with the San Diego
6 Police Department robbery unit telephoned Saibu on Saibu's cell phone, No. (619)
7 709-4019. Detective McGhee told Saibu that his name had come up in connection
8 with a series of bank robberies that were under investigation. Saibu told Detective
9 McGhee he was in Mississippi with his family, he had been there about a week, and
10 he had received a call from Cummings Sr., who told him something was going on
11 with Saibu's cousin. Saibu said he did not know what part of Mississippi he was in,
12 because he did not know his way around there, and his family was at work. He
13 indicated to Detective McGhee that when they returned, he would ask them and call
14 Detective McGhee back. Detective McGhee told Saibu he wanted to verify that Saibu
15 was in Mississippi and asked Saibu to step outside and look at an address or pick up a
16 piece of mail and check out the address. Saibu refused and told Detective McGhee
17 that Cummings was not involved.

18 When Detective McGhee then asked Saibu who was involved, Saibu
19 responded, "Rachel [Kinsel] and Ace [Valentino]." Saibu added that "Ace" was
20 someone named Antonio, he did not know Antonio's last name or where he lived, and
21 he had only met Antonio on a couple of occasions. Saibu said he would return from
22 Mississippi on Friday and would meet with Detective McGhee in person upon his
23 return. Saibu complained that he was hearing that he was the mastermind. He also
24 told Detective McGhee that Cummings Sr. told him "[W]hen you guys find me,
25 you're gonna shoot me on sight or some kind crap like that." Saibu also said he was
26 told he would be thrown in jail and given "two life sentences." Saibu did not contact
27 Detective McGhee that Friday as he said he would.

28 Detective McGhee eventually interviewed Saibu at police headquarters and
told him he wanted to talk about some robberies. Detective McGhee asked Saibu
where he had been. Saibu replied he left for New York in June or July and remained
there until around Christmas time. Saibu then changed the starting date of his New
York trip to "July or August." Saibu said he was visiting with a childhood friend and
with his father. When Detective McGhee asked whether he knew a woman named
Rachel, Saibu said he did not. Detective McGhee then asked Saibu whether he knew
a woman named Rachel Kinsel. Saibu said he had never heard that name before.
When Detective McGhee told Saibu that his phone number was in Kinsel's cell phone
book, Saibu said he did construction work and gave his business cards to a lot of
people. When Detective McGhee asked Saibu whether he knew Coleman, Saibu
indicated he did not. Saibu gave the same answer when asked whether he knew a
man named "Ace" or Valentino, or Cummings, or "Mike [Squire]." When Detective
McGhee showed Saibu a photograph of Valentino, Saibu said he looked like a dude
he had met or seen at a check cashing place a week earlier.

When Detective McGhee asked Saibu whether his fingerprints would be
found in Kinsel's car, Saibu said they would be on the stereo and the inside of the car,
and they could be in the trunk. Detective McGhee asked whether Saibu had a cell
phone, and Saibu replied he had several cell phones and had lost a couple of them in
New York, including a phone number that began with "709." When Detective
McGhee referred to the telephone conversation he had with Saibu the previous
August, Saibu first said he did not remember the conversation. He then said he
thought it was a joke.

1 4. *Kinsel's plea agreement and accomplice testimony re the bank*
2 *robberies*

3 Through the license plate information that Woodward provided, the police
4 determined that the red car was a 1993 Mazda owned by Kinsel. Officers went to
5 Kinsel's apartment in Imperial Beach, where they saw the red Mazda parked about
6 100 to 150 yards from where she lived. They searched Kinsel's bedroom and found
7 \$1,026 inside a foam container. The cash was stained with red dye.

8 In the afternoon on August 29, Kinsel was arrested for the August 13, 19 and
9 29 bank robberies. Kinsel eventually admitted she was the getaway car driver for all
10 three robberies. Charges were filed against her, and counsel appointed to represent
11 her.

12 On September 9, after consulting with her attorney, Kinsel signed an
13 agreement titled "Agreement Regarding the Initial Meeting Between Potential
14 Cooperating Individuals and Prosecution," under which she agreed to participate in a
15 "free talk" interview at the district attorney's office where she would provide details
16 about the crime.

17 On January 6, 2006, on the advice of counsel, Kinsel signed a second
18 agreement, titled, "Office of the District Attorney Cooperating Individual []
19 Agreement" (CI agreement) and entered into a plea agreement. Kinsel pleaded guilty
20 to three counts of armed robbery, each one a "strike," with an agreed-upon sentence
21 range of four to seven years, in return for truthful testimony at trial. Under the CI
22 agreement, the original charges would be reinstated if her testimony was not truthful,
23 and she would be charged with perjury.

24 Kinsel testified that in August Coleman was her boyfriend. Cummings was
25 one of Coleman's friends. In March Coleman had introduced Kinsel to his cousin,
26 Valentino. Kinsel and Valentino became good friends, and they spoke on the phone
27 about once a day. Coleman had also introduced Kinsel to Saibu and Squire.

28 Early in the morning on August 13, while Kinsel was at Coleman's house,
29 Valentino approached her and said he, Saibu and Squire were going to rob a bank.
30 Valentino offered her \$1,000 to give them a ride after the robbery. Kinsel owned a
31 1993 burgundy Mazda MX6. She retrieved her car keys and went into the living
32 room; Saibu and Squire were there. Two shotguns and a long handgun were on the
33 floor. Sometime between 8:00 a.m. and 9:00 a.m., Valentino indicated it was time to
34 leave and told Kinsel that he, Saibu and Squire were going to the bank in a stolen car
35 and that she should follow them in her car. Kinsel followed them. After stopping at
36 Polk Avenue and 30th Street, they directed Kinsel to wait there, and then they drove
37 away. Saibu asked that she leave her car trunk open so they could put the guns in the
38 trunk when they returned.

39 When Valentino, Saibu and Squire returned about 15 to 20 minutes later, they
40 got into her car and she drove them to Coleman's house. During the return trip,
41 appellants discussed how they wished they could have "hit the safe." Saibu paid
42 Kinsel the agreed-upon sum of \$1,000.

43 Kinsel testified that on August 19, she again drove the getaway car after
44 appellants robbed a bank. That day she saw appellants in Coleman's living room.
45 The men were wearing dark hooded sweatshirts and jeans, and each was holding a
46 bandanna. She saw the same three guns. Appellants asked Kinsel to help by driving
47 as she did on August 13. Appellants got into a purple van. At trial, Kinsel indicated

1 that a photograph of Banuelos's Ford Windstar minivan depicted the van appellants
 2 used on August 19. Valentino told her that he waited at a gas station until someone
 left a car with the keys in the ignition, then he "hopped in it and took it."

3 Driving her own car, Kinsel followed appellants to a park in La Mesa. [sic]
 4 where appellants directed her to pull over, leave the trunk open, and wait. When
 appellants returned about 15 to 20 minutes later, they got into her car and she drove
 5 them to Coleman's house. During the return trip, one of the appellants joked about
 saying "have a nice day" at the end of the robbery. Saibu paid \$1,000 to Kinsel, who
 6 gave some of the money to Coleman.

7 Kinsel also testified that one of the appellants asked her to again be the
 getaway driver in a robbery that would take place on August 29. Saibu had
 8 telephoned her a couple of days earlier to tell her about the plan. In the evening on
 August 28, Saibu phoned Kinsel and asked her to pick him up early the next morning
 and to call him at 5:00 a.m. When Kinsel called Saibu early in the morning on
 9 August 29, Saibu gave her directions to his location in east San Diego. She could not
 find the location and telephoned Saibu several times on his cell phone while she was
 10 in her car to tell him she was lost. Kinsel finally met up with Saibu between 5:20 and
 5:30 a.m., and Saibu got into her car. Saibu told her to drive him to Mira Mesa, then
 11 directed her to a Wells Fargo Bank near Black Mountain Road. Saibu showed her a
 side street near the bank and told her that was where she would wait for them[.]
 12 Kinsel then drove Saibu back to where she had picked him up.

13 At some point in the morning on August 29, Valentino telephoned Kinsel and
 asked her for a ride. She drove Valentino to Cummings's house, where she and
 14 Valentino met Saibu and Squire. Kinsel saw Saibu take the guns out of his car.
 Appellants put on black hooded sweatshirts and dark jeans. Squire's sweatshirt had
 15 the word "Outkast" on it. Saibu told her that because the police would be looking for
 three African-American men, on the return trip Squire would lie down on the back
 16 seat, he (Saibu) would hide in the trunk, and because Valentino is not Black, he
 would sit in the front seat with Kinsel.

17 Appellants went to the bank in a silver Mazda, and Kinsel followed them in
 18 her car. She stopped and waited at the prearranged location. When appellants
 returned about 20 minutes later, they had a small black duffel bag, and it looked like
 19 they had been crying. Kinsel asked what was wrong, and Valentino said something
 about gas going off. Saibu put the guns in the trunk of Kinsel's car. Kinsel drove
 20 appellants back to Cummings's house. Kinsel was paid \$1,000 for her assistance.

21 (Lodgment No. 6 at 9-19.)

22 **IV. DISCUSSION**

23 **A. Scope of Review**

24 Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal
 25 habeas corpus claims:

26 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
 27 entertain an application for a writ of habeas corpus in behalf of a person in custody
 pursuant to the judgment of a State court only on the ground that he is in custody in
 28 violation of the Constitution or laws or treaties of the United States.

28 U.S.C.A. § 2254(a) (West 2006) (emphasis added). As amended, 28 U.S.C. § 2254(d) reads:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1)-(2) (West 2006) (emphasis added).

“The Anti-Terrorism & Effective Death Penalty Act [AEDPA] establishes a ‘highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.’” Womack v. Del Papa, 497 F. 3d 998, 1001 (9th Cir. 2007) (quoting Woodford v. Viscotti, 537 U.S. 19, 24 (2002)). To obtain federal habeas relief, Saibu must satisfy either § 2254(d)(1) or § 2254(d)(2). See Williams v. Taylor, 529 U.S. 362, 403 (2000). The Supreme Court interprets § 2254(d)(1) as follows:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Williams, 529 U.S. at 412-13; see also Lockyer v. Andrade, 538 U.S. 63, 73-74 (2003).

Where there is no reasoned decision from the state’s highest court, the Court “looks through” to the underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). If the dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must conduct an independent review of the record to determine whether the state court’s decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by Lockyer, 538 U.S. at 75-76); accord Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim “so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]” the state court decision will not be “contrary to” clearly established federal law. Early v. Packer, 537 U.S. 3,

1 8 (2002).

2 **B. Analysis**

3 Saibu alleges his federal constitutional rights were violated because: (1) the trial court
4 improperly excluded evidence of robberies committed in the same manner, and during the same
5 general time period, as the charged crimes, which suggested individuals other than Saibu and his co-
6 defendants committed the charged crimes; (2) the accomplice jury instruction given in this case,
7 California Criminal Jury Instructions (“CALCRIM”) No. 335, lessened the prosecution’s burden of
8 proof because it instructed the jury that the evidence corroborating an accomplice’s testimony need
9 only be slight and “tend to” connect the accomplice with the charged crime, rather than instructing
10 jurors that corroboration must be proven beyond a reasonable doubt; (3) the evidence was
11 insufficient to corroborate the testimony of accomplice Rachel Kinsel (hereinafter “Kinsel”); and (4)
12 the trial court imposed a consecutive term on count two based on facts not found true by a jury
13 beyond a reasonable doubt. (Pet. at 6-9; Exhibit at 10, 20, 30, 36.)

14 Respondent asserts, with respect to claims one and four, the state court’s adjudication of the
15 claims was neither contrary to, nor an unreasonable application of, clearly established Supreme
16 Court law. (Respt’s Mem. at 21.) Respondent argues that claims two and three fail to state a federal
17 constitutional question and are meritless. (*Id.* at 18, 19.)

18 1. *Third Party Exculpatory Evidence of Other Robberies*

19 In claim one, Saibu contends that the trial court violated his Sixth Amendment right to
20 confrontation and a jury determination of the facts by improperly excluding potentially exculpatory
21 evidence of other robberies. (Pet. at 6; Exhibit at 10.) Petitioner argues that the trial court
22 improperly excluded the evidence because it erroneously applied the standard articulated in People v.
23 Arline, 13 Cal.App.3d 200 (1970) for the admission of third party culpability evidence, requiring
24 “some competent and substantial proof of a probability” that a third person committed the charged
25 crime. (Exhibit at 17.) However, Petitioner contends the Arline standard was rejected in People v.
26 Hall, 41 Cal.3d 826 (1986) and therefore the court should have applied the standard articulated in
27 Hall (“Hall test”), under which there must be direct or circumstantial evidence linking the third party
28 to the actual perpetration of the crime which is capable of raising a reasonable doubt of defendant’s

1 guilt, and the court must determine whether the evidence is substantially more prejudicial than
 2 probative under California Evidence Code section 352. (Id. at 17-18.) According to Saibu, the trial
 3 court violated his federal his due process rights by excluding the evidence, citing Holmes v. South
 4 Carolina, (“Holmes”) 547 U.S. 319 (2006). (Id. at 18.) Petitioner contends the Court of Appeal
 5 similarly erred in affirming the trial court’s exclusion of the evidence by applying the higher standard
 6 articulated in Arline. (Id. 17.) In the alternative, Petitioner contends the evidence of numerous
 7 similarities between the charged and uncharged crimes should have been admitted to show identity
 8 through common modus operandi, as it would be under California Evidence Code Section 1101
 9 citing People v. Sullivan, 151 Cal.App.4th 524 (2007), and People v. Donnell, 52 Cal.App. 3d 762
 10 (1975). (Exhibit at 15-16.)

11 Respondent counters that the state courts properly applied the Hall test in finding the
 12 proffered evidence was simply “too general” to support its admission, and it was insufficient to raise
 13 a reasonable doubt as to Petitioner’s guilt. (Resp.’s Mem. at 17.) According to Respondent, the
 14 United States Supreme Court in Holmes specifically approved of the standard set forth in Hall as
 15 consistent with federal constitutional principles, therefore, both the trial court’s exclusion of third
 16 party culpability evidence and the appellate court’s affirmation of the trial court relying on Hall, was
 17 neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Id.
 18 at 12, 17.)

19 Petitioner challenged the trial court’s exclusion of this evidence in a petition for review he
 20 filed in the California Supreme Court which was denied without citation of authority. (Lodgment
 21 Nos. 7, 8.) Because there is no reasoned decision from the state’s highest court, the Court “looks
 22 through” to the underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06
 23 (1991). The Court of Appeal summarized the claim as follows:

24 On August 10, 2006, Valentino filed a set of in limine motions, including one
 25 asking the court to admit “third party culpability” evidence of other bank and credit
 26 union robberies and attempted robberies committed by different suspects in San
 27 Diego County in June and July of 2006. Attached as exhibits to the motions were two
 28 news articles (“Authorities Identify Possible Serial Bank Robbers,” published Aug. 5,
 2006, at the Yahoo! News web site and “Warrants issued for men linked to bank
 robberies: Up to 10 crimes could be related,” published August 4, 2006, in The San
Diego Union-Tribune newspaper) reporting that two African-American men, 24-year-
 old Jean Pierre Rices and 31-year-old Lewis Hodges, were suspects in up to 10 actual
 or attempted robberies committed between June 1, 2005 and July 31, 2006.

Specifically, the articles stated that Rices and Hodges were suspected of trying to rob a Bank of America branch on Second Street in El Cajon on July 28, 2006; of robbing a Washington Mutual bank branch on Winter Gardens Boulevard in Lakeside on July 31, 2006; and of trying to rob the USA Credit Union on Black Mountain Road in Mira Mesa, also on July 31, 2006. The articles reported that authorities believed Rices and Hodges might also be responsible for seven other bank robberies or attempted robberies. [fn omitted.] The robberies listed in the articles did not include any of the four robberies involved in the instant case, all of which were committed in 2005. Valentino's codefendants joined in this motion.

The court held a two-day hearing on the motion. Cofedendants' counsel asked the court to admit evidence of the June 2005-July 2006 robberies and attempted robberies because they involved the same modus operandi involved in the commission of the 2005 offenses at issue in the instant case.

Upon inquiry from the court, all defense counsel agreed there was no direct evidence linking any third party to one or more of the crimes charged in the instant case. The reporter's transcript of the August 22, 2006 hearing shows the following exchanges took place between the court and defense counsel:

"The Court: . . . I think everybody can agree there's no direct evidence linking any unnamed third party to the crimes that are charged; is that something that everybody can agree on?"

"[Valentino's counsel, Keith Rutman]: Such as, yeah. An informant who says that Mr. Smith out there is the guy who really did these bank robberies. I think I'd have to agree that there's no evidence like that.

"The Court: Mr. Cox, related to direct evidence, do you agree?"

"[Squire's counsel, Joseph Cox]: I agree.

"The Court: Mr Puglia?"

"[Saibu's counsel, Frank Puglia]: Yes, Your Honor.

"The Court: Ms. Bukowski?"

"[Cummings' counsel, Roxane Bukowski]: Yes.

"The Court: Mr. Fielding?"

"[Coleman's counsel, John Fielding]: Yes.

"The Court: Okay. So the only thing is w[h]ether or not . . . the circumstantial evidence . . . is sufficient to warrant allowing the third party culpability defense."

The court informed counsel that "where I'm stuck at is the requirement that there has to be some direct or circumstantial evidence. I understand what circumstantial evidence is, connecting a third party to these crimes. [¶] . . . I think it's far too generic to just say there were other Black men out there committing crimes. We have police reports in evidence. There has to be some link. There has to be something that connects them there other than something that's marginal [such] as

1 race and some aggressive style.”

2 On August 23, 2006, the second day of the hearing, Saibu’s counsel made an
3 additional offer of proof regarding three bank robberies committed on May 3, June 3,
4 and July 7 of 2005, which he claimed demonstrated “pretty much the same [modus
operandi].”

5 After considering the relevant case law, the court denied without prejudice the
6 defense in limine request to present the proffered third party culpability evidence.
7 The court indicated that the issue to be determined was whether the proffered
8 evidence was capable of raising a reasonable doubt as to the defendants’ guilt with
9 respect to the charged crimes; and, specifically, whether there was a sufficient direct
10 or circumstantial evidentiary link between the charged and uncharged offenses.
11 Noting that “we have several bank robberies that are similar as to time” and general
12 location with similar modus operandi involving dark clothing, masks, guns, and
13 aggressive behavior, the court found the similarities argued by defense counsel were
14 “far too general” to allow the court to make a finding that the evidence was capable of
15 raising a reasonable doubt as to the defendants’ guilt.

16 During trial, the defense renewed the motion to present the proffered third
17 party culpability evidence. The court again denied the motion, finding that the
18 defense had provided no substantive evidence of a link or nexus between the
19 uncharged robberies and the offenses charged in this case.

20 (Lodgment No. 6 at 24-27.)

21 The appellate court articulated the applicable legal standard set forth in Hall, stating:

22 [T]he [California] Supreme Court in Hall adopted a two-step test (Hall test)
23 for determining the admissibility of proffered third party culpability evidence. First,
24 the court must determine whether there is *direct* or *circumstantial* evidence that both
25 links the third party to the actual perpetration of the crime and is *capable of raising a*
26 *reasonable doubt of defendant’s guilt*. (Hall, *supra*, 41 Cal.3d at p. 834; accord
27 People v. DePriest (2007) 42 Cal.4th 1, 43 (“Under Hall and its progeny, third party
28 culpability evidence is relevant and admissible only if it succeeds in ‘linking the third
person to the actual perpetration of the crime’”). . . Second, the court must determine
whether the evidence is admissible under Evidence Code section 352. (Hall, *supra*, at
pp. 834-835; accord, Bradford, *supra*, 15 Cal.4th at 1325 [in assessing an offer of
proof relating to evidence of the culpability of a third party, the court “must decide
whether . . . it is substantially more prejudicial than probative under Evidence Code
section 352”].) The United States Supreme Court has approved the Hall test under
federal constitutional principles. (Holmes v. South Carolina (2006) 547 U.S. 319,
326-327).

(Lodgment No. 6 at 28) (emphasis added.)

The Court of Appeal “conclude[d] the trial court did not abuse its discretion in finding the
proffered circumstantial similarities between the uncharged robberies and the charged robberies were
‘too general’ to support a finding that the evidence was capable of raising a reasonable doubt as to
the defendants’ guilt.” (Lodgment No. 6 at 29.) The court reasoned:

///

1 The record of the in limine proceedings shows the court carefully considered
 2 all 14 of the proffered circumstantial similarities argued by defense counsel. For
 3 example, the court found that “it’s far too generic to just say there were other Black
 4 men out there committing crimes,” and “[t]here has to be something that connects
 5 them there other than something that’s marginal [such] as race and some aggressive
 6 style.” The court discussed the two robberies in which tellers with guns to their heads
 7 were taken to a vault and the perpetrator holding the gun counted backwards to get
 8 the teller to hurry up in opening the vault. The court also noted that “we have several
 9 bank robberies that are similar as to . . . general times” and “general locations,” and
 10 “[i]t appears that they have similar [modus operandi] that has been previously listed -
 11 black clothing, dark clothing, masks, guns, aggressive behavior, things of that
 12 nature.” Stating it “just cannot, in the facts that we have, get beyond the general
 13 similarities,” the court found the proffered similarities were “far too general” to allow
 14 the court to make a finding that the evidence was capable of raising a reasonable
 15 doubt. The court did not abuse its discretion. Because the proffered evidence was
 16 insufficient under the first prong of the Hall test to raise a reasonable doubt as to
 17 Saibu’s . . . guilt, [therefore] we need not reach the second prong of that test, and we
 18 conclude the court did not err by excluding that evidence.”

19 (Id. at 30.)

20 The federal Constitution guarantees a criminal defendant the right to present a meaningful
 21 defense, “whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . the
 22 Compulsory Process or Confrontation Clauses of the Sixth Amendment.” Crane v. Kentucky, 476
 23 U.S. 683, 690 (1986); Holmes, 547 U.S. at 324. However, the accused does not have an unfettered
 24 right under the Due Process Clause to offer relevant evidence that is unduly prejudicial, confusing,
 25 privileged or otherwise inadmissible under standard rules of evidence. See Montana v. Egelhoff,
 26 518 U.S. 37, 41-42 (1996); Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir.1983). Third party
 27 culpability evidence may be excluded “if its probative value is outweighed by certain other factors
 28 such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” Holmes, 547 U.S.
 at 326. Even if the exclusion of evidence rises to the level of constitutional error, the erroneous
 exclusion must have had “a substantial and injurious effect” on the verdict for habeas relief to be
 granted. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

 Petitioner has not demonstrated that the trial court’s exclusion of third party evidence and the
 appellate court’s affirmation of that decision, was contrary to, or an unreasonable application of,
 clearly established federal law, or that it had a substantial and injurious effect on the verdict. The
 Court concludes that the state court correctly applied the Hall standard, as adopted by the United
 States Supreme Court in Holmes, in focusing on whether there was sufficient direct or circumstantial

1 evidence to link the uncharged crimes to the charged crimes that was capable of raising a reasonable
2 doubt as to the defendant's guilt.

3 Under Hall, third party evidence must have a connection to the charged crimes, in particular
4 facts or evidence that suggests someone other than defendant committed the charged crime. Id., 41
5 Cal. 3d 826 (1986); see also Ayala v. Ayers, 2008 WL 313817 (S.D. Cal. 2008.) The defendant in
6 Hall was arrested and ultimately convicted for murder based on information from an informant. 41
7 Cal. 3d at 826. When the informant was arrested for drunk driving, he recounted very specific
8 details about the murder. Id. at 829-30. At trial, defendant attempted to introduce third party
9 culpability evidence showing the informant or someone else committed the crime and based his
10 theory on the fact that the informant had "intimate details of the murder not mentioned by the
11 defendant; on the fact that the victim's hyoid bone was broken on the left side [of his neck], although
12 defendant is right-handed; and on the proposed testimony of [the informant's] estranged wife that he
13 [was] left-handed, [was] violent when drunk, and ha[d] a history as a police informant." Id. at 830.
14 The trial court applied Arline and held that the evidence was inadmissible because it did not show
15 "substantial proof of a probability" that the informant committed the murder. Id. at 830.

16 The appellate court in Hall determined that the trial court wrongly excluded the evidence,
17 noting that defendant had submitted sufficient offers of proof linking the informant to the actual
18 murder, including distinctive waffle-stomper shoe prints at the murder site, like those worn by the
19 informant around that time, the left-handedness of the informant, and his knowledge of unique facts
20 about the murder. Id. at 833. The court of appeal reasoned:

21 To be admissible, the third-party evidence need not show "substantial proof of
22 a probability" that a third person committed the act; it need only be capable of raising
23 a reasonable doubt of defendant's guilt. At the same time, we do not require that any
24 evidence, however remote, must be admitted to show a third party's possible
25 culpability. As this court observed in Mendez, evidence of mere motive or
26 opportunity to commit the crime in another person, without more, will not suffice to
27 raise a reasonable doubt about a defendant's guilt: there must be direct or
28 circumstantial evidence linking the third person to the *actual* perpetration of the
crime.

Id. at 833 (emphasis added).

27 In the instant case, Petitioner attempted to argue that the evidence of other robberies with
28 similar M.O. could "establish identity though evidence of modus operandi," raising a reasonable

1 doubt that he committed the crimes. (Exhibit at 18.) However, unlike the defendant in Hall, who
 2 proffered specific items of evidence linking the informant to the murder, nothing in the newspaper
 3 articles specifically connected the uncharged robberies to the charged crimes. (Lodgment No. 1,
 4 Exhibit at 17-19.) At most, the articles described two young African-American males with
 5 semiautomatic handguns and an assault rifle jumping over counters during robberies committed from
 6 June 2005 until July 2006. (Id.) During trial, the court specifically asked the parties whether there
 7 were any distinctive marks on the clothing worn by the suspects in the uncharged robberies that
 8 would link them to the charged crimes, to which the parties responded there were not. (Lodgment
 9 No. 2 at 117.) As noted above, defense counsel also argued that there was a link between at least
 10 one of the uncharged robberies and one of the charged robberies because a perpetrator held a gun to a
 11 bank teller's head and counted backwards in an effort to speed her up. (Id. at 131-32.) Although the
 12 court acknowledged that the counting aspect was "an interesting fact being added to the equation"
 13 and that it was unique in some senses, it could not "get beyond the general similarities . . . even with
 14 the adding of the counting down, it's far too general to point back to this specific charge to . . . allow
 15 me to make a finding that the evidence is capable of raising a reasonable doubt." (Id. at 135, 137-
 16 38.)

17 When defense counsel attempted again during trial to introduce the evidence, the court
 18 reiterated that there needed to be something more specific linking the uncharged crimes to the actual
 19 crimes charged under Hall and offered the following:

20 [I]f you had an FBI agent come in, either the team leader or anybody that's
 21 investigating those crimes, and say that - - above and beyond the similarity in the
 22 method, or the MO - - that they have evidence linking the two, there is beyond just the
 23 common method - - I don't know what that evidence would be: a fingerprint; an
 24 identification; something that would say that, yes, these persons not yet identified to
 me in this court are the individuals or *likely could be* the individuals that committed
 this crime because of these pieces of evidence - - I think - - I'm stuck that black males
 wearing masks, with shotguns, is just far too generic in and of itself to survive the
Hall standard of evidence linking them to the actual perpetration of this crime.

25 (Id. at 1372-73) (emphasis added).

26 Petitioner argues that the trial court thereby reinstated the Arline test by requiring "substantial
 27 proof of a probability" that a third person committed the crime, despite the Hall Court's rejection of
 28 this standard. (Exhibit at 17.) As defense counsel vigorously argued at trial, Petitioner contends

1 that the court set the standard so high that no third party culpability evidence could ever meet the test
 2 without also exculpating defendants. (Id. at 1378-79.) “With your requirement . . . [] - - we’d never
 3 have a third-party culpability. We would have the third party who’s involved being tried and a
 4 defendant who wanted the third-party culpability dismissed because you’re requiring fingerprint,
 5 DNA, eyewitness, admission. We wouldn’t have a third-party culpability issue.” (Id. at 1378-79.)

6 Contrary to Petitioner’s assertion, the trial court did not require that Petitioner show substantial
 7 proof of a probability that someone else committed the crime, nor did the court require evidence which
 8 could exculpate defendant. Instead the court made clear that under Hall, the evidence must cast doubt
 9 on defendant’s guilt by inferring someone else *may* have committed the charged crime, and that this
 10 circumstantial evidence must *actually* link someone else to the charged crimes. (Lodgment No. 2 at
 11 1378.) The court noted that any inferences that could possibly be drawn from the similarities
 12 between the charged and uncharged crimes here were too general, reasoning:

13 Any reasonable person that exercises a choice to rob a bank, if there is such a
 14 person, knows they should mask up. And they would probably be more effective with
 15 the mask than with general clothing that is not unique; and being armed would be
 better than being unarmed; and directing people to move in certain fashions, get on
 the ground or face the wall. ¶ I don’t think those are specific or unique enough facts.

16 (Id. at 1381-82.)

17 The trial court effectively illustrated the M.O. used in the uncharged and charged robberies
 18 was not so unique as to suggest there was a distinctive link that would raise a reasonable doubt
 19 regarding Petitioner’s guilt of the charged offenses.

20 The appellate court similarly did not err when it affirmed the trial court’s exclusion of the
 21 evidence. The Court of Appeal determined the trial court carefully considered all the similarities
 22 between the charged and uncharged acts, and that it correctly held the evidence was too general to
 23 raise a reasonable doubt about Saibu’s guilt regarding the charged bank robberies. (Lodgment No. 6
 24 at 30.)

25 Petitioner’s contention that the appellate court elevated the standard of proof to require
 26 Petitioner show that someone else definitively committed the crimes charged is incorrect. Rather,
 27 the Court of Appeal illustrated why the evidence was too general to serve as circumstantial evidence
 28 of a link between the uncharged crimes and the charged crimes, in accordance with the standard set

1 forth in Hall and adopted in Holmes. (Id. at 29-30.) In this manner, the appellate court demonstrated
 2 that the evidence was properly excluded because it had “only a very weak logical connection to the
 3 central issues.” See Holmes, 547 U.S. at 330. Moreover, Petitioner does not cite to any state or
 4 federal cases in which evidence of other crimes with very generic modus operandi has been properly
 5 admitted as third party culpability evidence, nor has the Court found any.

6 In the alternative, Petitioner contends that the evidence was admissible under California
 7 Evidence Code section 1101.³ (Exhibit at 18.) Saibu reasons that “there is no logical distinction
 8 between offering evidence of uncharged bank robberies under section 1101 to prove the defendant
 9 committed the charged robbery - which was the situation in People v. Sullivan and People v.
 10 Donnell- and the purpose for which [Petitioner] offered the evidence of the uncharged robberies . . .
 11 [to] establish identity through evidence of modus operandi.” (Id.) Petitioner’s argument is
 12 unpersuasive. As Petitioner notes, Sullivan and Donnell allow the introduction of “other crimes”
 13 evidence under California Evidence Code section 1101 in order to prove a defendant committed the
 14 charged crimes. See Sullivan, 151 Cal.App. 4th at 557-58 (evidence of other robberies admissible to
 15 show common plan or scheme to prove defendant committed charged robberies because charged and
 16 uncharged crimes shared distinctive common marks); see also Donnell, 52 Cal.App. 3d at 777 (trial
 17 court properly admitted evidence of other bank robbery to infer defendant committed charged bank
 18 robbery because “the number and distinctiveness of the marks shared by the two incidents are
 19 sufficient to have raised a strong inference that the perpetrator of one was included among the
 20 perpetrators of another.”)

21 Contrary to the situation in Sullivan and Donnell, Petitioner attempted to introduce evidence
 22

23 ³ California Evidence Code section 1101 states:

24 “(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of
 25 a person's character or a trait of his or her character (whether in the form of an opinion, evidence
 26 of reputation, or evidence of specific instances of his or her conduct) is inadmissible when
 27 offered to prove his or her conduct on a specified occasion. ¶ (b) *Nothing in this section*
 28 *prohibits the admission of evidence that a person committed a crime, civil wrong, or other act*
when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,
knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution
for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith
believe that the victim consented) other than his or her disposition to commit such an act. ¶ (c)
Nothing in this section affects the admissibility of evidence offered to support or attack the
credibility of a witness.” Cal. Ev. Code §1101 (emphasis added).

1 of other bank robberies to demonstrate Petitioner did not commit the charged crimes, or at least to
2 create a reasonable doubt of his guilt. (Lodgment No. 2 at 108.) Further, defense counsel raised this
3 very argument during its renewed motion to admit the uncharged bank robbery evidence at trial.
4 (Lodgment No. 2 at 1374.) The court rejected the argument and reasoned that the evidence was
5 similarly insufficient when the prosecution attempted to introduce it under section 1101 before trial
6 because it was too general to link it to the six suspects. (Id. at 1374-75.) The defense countered by
7 analogizing that under both section 1101 and the third party culpability defense, there did not need to
8 be proof of an identifiable person who committed the other bank robberies for evidence to be
9 admissible. (Id. at 1375.) The court disagreed and reasoned that allowing witnesses to come in and
10 testify about similarities between the M.O. of the charged and uncharged crimes without having a
11 more solid link went beyond the scope of Hall, and clarified that “[t]hird party culpability is . . .
12 specific. It actually says there’s an identifiable person above and beyond just somebody out there
13 with the motive or opportunity to commit the crime.” (Lodgment No. 2 at 1375, 1381, 1383.) In
14 contrast, section 1101 allows evidence to show that a defendant had the motive or opportunity to
15 commit the crime as proof of a propensity to commit similar crimes. Cal. Ev. Code §1101(b). Thus,
16 because the trial court properly held third party culpability requires a link between the uncharged
17 crime and the charged crime, beyond mere motive or opportunity to commit the crime, Petitioner’s
18 alternative contention fails. See Hall, 41 Cal.3d at 833; Holmes, 547 U.S. at 327.

19 Instead, the state courts correctly determined that evidence of other black males, wearing
20 masks, with shotguns, robbing banks in an aggressive style was too generic to admit because nothing
21 in the proffered evidence provided a link to the charged robberies and its admission could have
22 potentially misled or confused the jury. See Holmes, 547 U.S. at 327 (evidence tending to prove that
23 another person committed the crime with which defendant is charged may be excluded when it is too
24 remote and lacks a sufficient connection between the other person and the charged crime.)

25 Even were the exclusion of other bank robberies to rise to the level of constitutional error,
26 any erroneous exclusion did not have “a substantial and injurious effect” on the verdict because there
27 was substantial evidence linking Saibu to the charged crimes. The testimony of Kinsel placed Saibu
28 at the crimes as a key participant and organizer. (Lodgment No. 2 at 1416, 1421, 1426, 1452.)

1 DeWayne Cummings Sr. testified that Saibu was with Kinsel at Cummings Sr.'s home the morning
2 of August 29, 2005, the day of one of the robberies. (Id. at 1157-64.) San Diego Police Department
3 Detective McGhee testified that Saibu falsely claimed he did not know Kinsel, and provided multiple
4 false alibis to law enforcement. (Id. at 2356-60.) Accordingly, even if the jury heard the evidence
5 of other uncharged robberies, there was sufficient independent evidence for the jury to find Petitioner
6 guilty beyond a reasonable doubt.

7 For the above reasons, the state court's denial of this claim was neither contrary to, nor an
8 unreasonable application of, clearly established Supreme Court law. Williams, 529 U.S. at 412-13.
9 Saibu is not entitled to relief as to this claim.

10 2. Accomplice Jury Instruction CALCRIM No. 335

11 Saibu alleges in claim two that his due process rights under the Fifth Amendment and his
12 right to a jury determination of the facts under the Sixth Amendment were violated because the
13 accomplice instruction given in this case, CALCRIM No. 335, lowered the prosecution's burden of
14 proof by instructing the jury that the evidence supporting the testimony of an accomplice need only
15 be "slight" and "tend to" connect Petitioner to the crime, rather than requiring the evidence
16 supporting the testimony be subject to the proof beyond a reasonable doubt standard. (Pet. at 7;
17 Exhibit at 20.) Petitioner contends that each element of the accomplice corroboration requirement
18 must be proved beyond a reasonable doubt, as required for the elements of a charged offense, and
19 that CALCRIM No. 335 undercuts the standard of proof by allowing the jury to find the accused
20 guilty if other evidence "tends to" connect the defendant to the crime charged, thereby violating the
21 federal constitution. (Exhibit at 25-26.) Thus, according to Petitioner, the "jury was never told it
22 had to believe the testimony of the accomplice beyond a reasonable doubt, [and therefore] the jury
23 could not have understood the aggregate of the accomplice testimony and the supporting evidence
24 had to establish guilt beyond a reasonable doubt." (Exhibit at 26.)

25 Respondent argues that the United States Supreme Court "has never required that the
26 Constitution requires corroboration of accomplice testimony or instruction on such corroboration."
27 (Resp's Mem. at 21.) Because there is no clearly established federal law for the Court of Appeal to
28 apply, Respondent argues Petitioner's second claim must fail. (Id.)

1 Saibu raised this claim in a petition for review he filed in the California Supreme Court
 2 which was silently denied. (Lodgment No. 7, 8.) As before, this Court must “look through” to the
 3 California appellate court’s decision denying the claim. See Ylst, 501 U.S. at 801-06. That court
 4 summarized Petitioner’s claims as follows:

5 Specifically, Saibu maintains that CALCRIM No. 335 is constitutionally
 6 infirm because (1) it failed to tell the jury that the accomplice, Kinsel, had to be
 7 credible beyond a reasonable doubt; and (2) the language instructing the jury that the
 8 evidence supporting Kinsel’s testimony only had to be “slight” and “tend to connect
 the defendant to the commission of the crimes” did not require proof beyond a
 reasonable doubt. We reject this contention.

9 . . .
 10 Saibu’s claim that CALCRIM No. 335 as given by the court unconstitutionally
 11 lessened the prosecutions’ burden of proof by “requir[ing] far less proof than [proof]
 12 beyond a reasonable doubt,” is unavailing. In People v. Frye (1998) 18 Cal.4th 894,
 965-966, the California Supreme Court held that under the principles governing the
 law of accomplices, “[c]orroboration need only be slight” and rejected the defendant’s
 characterization of the accomplice corroboration requirement as an element of the
 crime subject to proof beyond a reasonable doubt.

13 (Lodgment No. 6, at 34-36.)

14 As a general rule, challenges to jury instructions are questions of state law and it is well
 15 established that alleged state law errors are not cognizable in habeas corpus review. See Estelle v.
 16 McGuire, 502 62, 71-72 (1991); Pulley v. Harris, 465 U.S. 37, 41 (1984); O’Bremski v. Maass, 915
 17 F.2d 418, 423 (9th Cir. 1990). Federal habeas relief is warranted only in cases where a petitioner
 18 establishes that the ailing instruction by itself “so infected the entire trial that the resulting conviction
 19 violates due process.” McGuire, 502 U.S. at 71-72; see also Donnelly v. DeChristoforo, 416 U.S.
 20 637, 643 (1974) (explaining that the challenged instruction cannot merely be “undesirable,
 21 erroneous, or even ‘universally condemned’” — it must violate some constitutional right); Townsend
 22 v. Knowles, 562 F.3d 1200, 1209 (9th Cir. 2009). The instruction may not be judged in artificial
 23 isolation, rather, it must be considered in the context of both the instructions as a whole and the trial
 24 record. See McGuire, 502 U.S. at 72. McGuire presupposes that the jury instruction was somehow
 25 faulty under state law. See Id. at 71-72.

26 Petitioner acknowledges that due process does not require corroboration of accomplice
 27 testimony, but argues the “issue of whether corroboration of accomplice testimony is part of the due
 28 process requirement of proof beyond a reasonable doubt is distinct from the issue of whether the

1 accomplice *instruction* undermined the reasonable doubt standard.” (Traverse at 10) (emphasis
2 added.)

3 A review of the trial record and panoply of jury instructions demonstrates that CALCRIM
4 No. 335 did not reduce the prosecution’s burden of proof, nor did it violate Petitioner’s due process
5 rights. The trial court first instructed the jury to “[p]ay careful attention to all of [the] instructions
6 and consider them together.” (Lodgment No. 2, at 3002.) Shortly thereafter the court gave the
7 standard reasonable doubt instruction CALCRIM 220⁴, followed closely by a modified version of
8 CALCRIM No. 335, as follows:

9 If the crimes of [c]onspiracy to commit robbery, kidnapping, robbery, assault with a
10 deadly weapon, or unlawful driving or taking of a vehicle were committed, then
11 Rachel Kinsel was an accomplice to those crimes. [¶] You may not convict the
12 defendant based on the statement or testimony of an accomplice alone. You may use
13 the statement or testimony of an accomplice to convict the defendant only if: [¶] 1.
14 The accomplice’s statement or testimony is supported by other evidence that you
15 believe; [¶] 2. That supporting evidence is independent of the accomplice’s statement
16 or testimony; AND [¶] 3. That supporting evidence *tends to* connect the defendant to
17 the commission of the crimes. [¶] Supporting evidence, however, may be *slight*. It
18 does not need to be enough, by itself, to prove that the defendant is guilty of the
19 charged crime, and it does not need to support every fact about which the witness
20 testified. On the other hand, it is not enough if the supporting evidence merely shows
21 that a crime was committed or the circumstances of its commission. The supporting
22 evidence must tend to connect the defendant to the commission of the crime. [¶] The
23 evidence needed to support the statement or testimony of one accomplice cannot be
24 provided by the statement or testimony of another accomplice. [¶] However,
25 Defendant’s own statement and inferences therefrom may be sufficient corroborative
26 testimony. [¶] Any statement or testimony of an accomplice that tends to incriminate
27 the defendant should be viewed with caution. You may not, however, arbitrarily
28 disregard it. You should give that statement or testimony the weight you think it
deserves after examining it with care and caution and in the light of all the other
evidence.

(Lodgment No. 2 at 3016-17.)

Petitioner references three notes sent by the jury asking for clarification of CALCRIM No.
335 presumably in support of his claim, but does not demonstrate why these notes are relevant or

⁴ The court instructed the jury with CALCRIM No. 220 as follows: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegations beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. ¶ Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. ¶ In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty.” (Lodgment No. 2 at 3004.)

1 what they show.⁵ (Exhibit at 21-23.) Instead, Petitioner argues that the “reasonable doubt
 2 instruction was in effect modified by CALCRIM 335 and created conflicting instructions.” (*Id.* at
 3 25.) According to Petitioner, CALCRIM No. 335 allows a defendant to be convicted based on
 4 accomplice testimony and permits the evidence supporting the accomplice testimony to be “slight”
 5 and “tend to connect” the defendant to the crime, thereby undermining the reasonable doubt
 6 instruction. (*Id.* at 26.) Therefore, a jury could determine a defendant’s guilt by relying on
 7 independent evidence which supported the accomplice’s statement that was not subject to the
 8 reasonable doubt standard. (*Id.*)

9 After reviewing the instructions, notes, and responses, it is clear that Petitioner’s argument is
 10 unpersuasive. Here, the jury was properly instructed that it must find guilt beyond a reasonable
 11 doubt for all charged crimes in CALCRIM No. 220, and specifically that “[i]n deciding whether the
 12 People have proved their case beyond a reasonable doubt, you must impartially compare and
 13 consider *all the evidence* that was received throughout the entire trial.” (Lodgment No. 2 at 3004)
 14 (emphasis added.) Although the jury did not need to determine whether Kinsel’s accomplice
 15 testimony was corroborated by evidence beyond a reasonable doubt, the jury was required to weigh
 16 all the evidence, including evidence received that supported Kinsel’s testimony, in determining

18 ⁵ In note fourteen, the jury asked “Does guilt of one crime fulfill the requirement of being
 19 evidence that tends to connect, although slight? (if we believe Rachel, and we believe there is guilt in
 20 another crime, can that belief in guilt of one crime be used as supporting evidence in another crime?)”
 21 (Lodgment No. 1 at 473.) In note fifteen, the jury asked “Can we use a supporting statement to connect
 more than 1 defendant and satisfy item 3 of instruction 335, even though the evidence doesn’t
 specifically connect a particular defendant?” (*Id.* at 474.)

The Court answered, “In question 14 you ask in part “does guilt of one fulfill the requirement
 of being evidence that tends to connec [sic]. . . “¶ You may not use a finding of guilt on other crimes
 as supporting evidence tending to connect one to the commission of the crime in question. ¶ However,
 the facts used to reach such a finding may be used as supporting evidence if those facts tend to connect
 one to the crime in questions.[sic] ¶ In question 15 you ask about supporting statements. ¶ You may use
 a defendants own statement[s] as corroboration against him but not against the other defendants. ¶ To
 address both questions refer to the last four paragraphs of CalCrim 335. (*Id.* at 475.) The Court also
 stated, “In Jury Note #15, you asked the following question: ¶ ‘Can we use a supporting statement to
 connect more than 1 defendant and satisfy item 3 of instruction 335, even though the evidence doesn’t
 specifically connect a particular defendant’? During a court inquiry yesterday, October 18, 2006, you
 specified that the supporting statement mentioned in Jury Note #15, was a statement from Rachel Kinsel,
 an accomplice. ¶ ANSWER: ¶ For Purposes of CALCRIM 335 item 3, you may consider testimony of
 an accomplice to connect more than one defendant to the commission of a crime if: ¶ 1. The
 accomplice’s testimony is supported by other evidence that you believe; ¶ 2. That supporting evidence
 is independent of the accomplice’s statement or testimony, AND ¶ There is other evidence that you
 believe which also tends to connect the other defendants to the commission of the crime.” (*Id.* at 476.)

1 whether they were convinced of Saibu's guilt beyond a reasonable doubt.

2 Jurors are presumed to have followed the instructions as a whole, including the instructions
3 regarding the prosecution's burden of proof for the elements of the charged crimes. See Shannon v.
4 United States, 512 U.S. 573, 585 (1994); Richardson v. Marsh, 481 U.S. 200, 206 (1987).

5 Additionally, the jury sent multiple notes concerning CALCRIM 335 to verify they thoroughly
6 understood the requirements of the instruction before applying it to the evidence. (Lodgment No. 1
7 at 473-76.) It is immaterial that CALCRIM No. 335 included sub-parts that allowed supporting
8 evidence to be "slight" or "tend to" connect a defendant to the crime for the jury to convict on the
9 basis of Kinsel's accomplice testimony, as it does not alter the requirement that the prosecution was
10 required to prove the elements of robbery, kidnapping for robbery, conspiracy, and false
11 imprisonment beyond a reasonable doubt. Accomplice corroboration is not an element of any of the
12 crimes with which Petitioner was charged, and therefore, CALCRIM No. 335 did not reduce the
13 prosecution's burden of proof because the prosecution was not required to prove the veracity of
14 Kinsel's testimony beyond a reasonable doubt. Therefore, the Court of Appeal properly rejected
15 Petitioner's claim that CALCRIM No. 335 lessened the prosecution's burden of proof because the
16 evidence corroborating Kinsel's testimony was not an element of the charged crimes and subject to
17 the proof beyond a reasonable doubt standard.

18 In addition, there was sufficient independent evidence that served to support Kinsel's
19 testimony connecting Saibu to the commission of the robberies. Witness Cummings, Sr. testified
20 that Saibu came over to Cummings Sr.'s house the morning of the August 29th robbery and that his
21 son DeWayne Cummings was there, as well as Kinsel. (Lodgment No. 2 at 1157-64.) According to
22 Cummings Sr., Saibu had been to the house three or four times before that day, and Saibu did some
23 work on Cummings Sr.'s house at one point. (Id. at 1161.) San Diego Police Detective McGhee
24 testified that Kinsel gave him Saibu's cell phone number, which McGhee called on August 30 and
25 spoke to Saibu. (Id. at 2362-66.) During the phone conversation, Saibu said he was in Mississippi
26 and that he had received a phone call from DeWayne Cummings, Sr. asking him to call McGhee.
27 (Id. at 2362.) McGhee later interviewed Saibu at police headquarters, at which time Saibu stated he
28 did not know Kinsel, was in New York during June and July 2005, did not know DeWayne

1 Cummings and had not done any work at the house. (Id. at 2356-60.) Later in the interview,
 2 McGhee asked Saibu if Saibu's fingerprints would be found in Kinsel's car, and Saibu stated they
 3 would be, probably on the stereo and in the trunk. (Id. at 2373.) The trial record thereby
 4 demonstrates there was sufficient evidence connecting Saibu to the other defendants, including on
 5 the day of one of the robberies, and that there was evidence that he gave false alibis twice to law
 6 enforcement, all of which supported Kinsel's testimony describing Saibu as a participant in the
 7 robberies. In addition, Kinsel testified pursuant to a plea agreement which required that she testify
 8 truthfully or risk losing the benefits of the agreement which included reducing her sentencing
 9 exposure to 4 to 7 years. (Lodgment No. 2 at 1501-02.)

10 As demonstrated above, the jury was 1) instructed to consider all the instructions as a whole,
 11 2) given clear instructions regarding the prosecution's burden of proof, and 3) received substantial
 12 independent evidence supporting Kinsel's testimony, in addition to being given CALCRIM No. 335.
 13 In light of the totality of the instructions and evidence, the accomplice instruction did not serve to
 14 lessen the prosecution's burden of proof, therefore, the instruction did not "so infect[] the entire trial
 15 that the resulting conviction violate[d] due process." McGuire, 502 U.S. at 71-72; Middleton v.
 16 McNeil, 541 U.S. 433, 437 (2004) ("In a criminal trial, the State must prove every element of the
 17 offense, and a jury instruction violates due process if it fails to give effect to that requirement.")

18 For the foregoing reasons, Petitioner's federal due process rights and right to a jury
 19 determination of the facts were not violated by the trial court's instruction of the jury with
 20 CALCRIM No. 335. In addition, Petitioner fails to demonstrate that CALCRIM No. 335 "so
 21 infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 71-
 22 72. Saibu is not entitled to relief as to this claim, and habeas relief is **DENIED**.

23 3. Sufficiency of the Evidence

24 In claim three, Saibu argues that his federal due process rights were violated because there
 25 was insufficient evidence to corroborate the accomplice testimony of Kinsel. (Pet. at 8; Exhibit at
 26 30.) Although Petitioner concedes "in federal practice there is no rule preventing conviction on
 27 uncorroborated testimony of accomplices," he argues the doctrine of fundamental fairness, as
 28 incorporated in the due process clause, requires that corroboration evidence be subject to the proof

beyond a reasonable doubt standard. (Traverse at 18; Exhibit at 33-34.)

Respondent counters that Petitioner is not entitled to federal habeas corpus relief on this claim because “corroboration of accomplice testimony is not constitutionally mandated,” and therefore, the claim does not present a federal question for this Court to review. (Respt’s Mem. at 18, 21.) Further, Respondent argues the claim fails under AEDPA because there is no clearly established federal law which the Court of Appeal could apply. (*Id.* at 21.)

Petitioner raised this claim in a petition for review he filed in the California Supreme Court which was silently denied. (Lodgment No. 7, 8.) Once again, this Court must “look through” to the California appellate court’s decision denying the claim. *See Ylst*, 501 U.S. at 801-06. That court summarized Petitioner’s claim as follows:

Kinsel’s accomplice testimony incriminatingly linked Saibu with the charged August 13, 19, and 29 bank robberies. As requested by stipulation of the parties, the court instructed Jury B with a modified version of CALCRIM No. 335, which instructed the jury that if the specified crimes were committed, Kinsel was an accomplice and her testimony had to be corroborated by “other evidence that you believe.” Jury B found Saibu guilty of robbery as charged.

(Lodgment No. 6 at 31.)

After reciting the applicable legal standard, the Court of Appeal concluded:

Here, the trial record contains evidence, independent of Kinsel’s accomplice testimony, which, by showing both that Saibu was with his coconspirators on the day of a charged offense and that he gave the police two false alibis after the crime, reasonably tends to connect him with the commission of the bank robberies and is sufficient to corroborate Kinsel’s accomplice testimony. Cummings Sr.’s testimony thus placed Saibu in Cummings Sr.’s home with Cummings and Kinsel, in the morning on August 29, the day appellants, Cummings and Coleman allegedly robbed the Wells Fargo Bank in Mira Mesa as charged in count 9.

Jury B also heard Detective McGhee’s recorded telephone interview of Saibu, which took place the next day, August 30, when McGhee called Saibu’s cell phone number, which McGhee had obtained from Kinsel. The transcript of the interview establishes that Saibu gave Detective McGhee a false alibi. Specifically, the transcript shows that when Detective McGhee told Saibu that his name had come up in connection with a series of bank robberies that were under investigation, Saibu falsely told Detective McGhee he was in Mississippi with his family, and he had been there about a week. When Detective McGhee told Saibu he wanted to verify that Saibu was in Mississippi and asked him to step outside and look at the address, or pick up a piece of mail and check out the address, Saibu refused. When Detective McGhee asked Saibu who was involved in the robberies, Saibu responded, “Rachel [Kinsel] and Ace [Valentino],” adding that “Ace” was someone named Antonio whose last name he did not know. Saibu said he would return from Mississippi on Friday and would meet with Detective McGhee in person upon his return. Detective McGhee testified that Saibu did not contact him that Friday as he said he would.

1 Detective McGhee also testified he eventually interviewed Saibu at the police
 2 headquarters, told him he wanted to talk about some robberies, and asked Saibu
 3 where he had been. Saibu gave a second false alibi, telling Detective McGhee he left
 4 for New York in June or July, and remained there until around Christmas time. Saibu
 5 then changed the starting date of his New York trip to "July or August," and said he
 6 was visiting with a childhood friend and with his father. When Detective McGhee
 7 asked Saibu whether he knew a woman named Rachel Kinsel, Saibu falsely said he
 8 had never heard that name before. When Detective McGhee asked Saibu whether he
 9 knew a man named "Ace" or Valentino, or Cummings, Saibu falsely indicated he did
 10 not.

11 We conclude that the foregoing independent evidence, by placing Saibu with
 12 coconspirators on the day of the August 29 Wells Fargo Bank robbery, and by
 13 establishing that he twice gave a false alibi to the police following the crime thereby
 14 evincing a consciousness of guilt, is sufficient to corroborate Kinsel's accomplice
 15 testimony.

16 (Lodgment No. 6 at 32-34.)

17 Federal courts do not require corroboration of accomplice testimony. See Augenblick, 393
 18 U.S. at 352 ("When we look at the requirements of procedural due process, the use of accomplice
 19 testimony is not catalogued with constitutional restrictions"); Williams v. United States, 308 F.2d
 20 664, 666 (9th Cir. 1962.) Petitioner recognizes that there is no corroboration requirement in federal
 21 court, but argues that "a state prisoner who alleges that the evidence in support of his state conviction
 22 cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a
 23 reasonable doubt has stated a federal constitutional claim." (Traverse at 18.) Petitioner argues that
 24 the evidence corroborating Kinsel's testimony, specifically Saibu's phone calls to Kinsel, his
 25 inconsistent statements about knowing Kinsel, his lies about his whereabouts at the time of the
 26 crime, and Cummings Sr.'s testimony that Saibu was with Kinsel the morning of one of the
 27 robberies, does not connect Saibu to the crimes, rather, it merely connects him to Kinsel or shows
 28 that he made inconsistent statements. (Exhibit at 30-31.)

29 Although Petitioner urges the Court to extend the proof beyond a reasonable doubt standard
 30 for corroboration evidence of accomplice testimony under the fundamental fairness doctrine, this
 31 Court declines. As the Court of Appeal noted, there was sufficient evidence connecting Saibu to the
 32 other defendants and the perpetration of the charged crimes for the jury to find him guilty beyond a
 33 reasonable doubt, irrespective of Kinsel's testimony. Therefore, Petitioner's due process rights were
 34 not violated even though the evidence corroborating Kinsel's testimony was not subject to the proof

beyond a reasonable doubt standard. Furthermore, the Court of Appeal's denial of this claim was not an unreasonable application of the facts in light of the evidence presented to the state court and relief is **DENIED**.

4. Consecutive Sentence on Count Two

Petitioner contends in claim four that the trial court's imposition of a consecutive sentence on count two should be modified to a concurrent term because the trial court was precluded from imposing a consecutive sentence for that count pursuant to Blakely v. Washington, 542 U.S. 296 (2004). (Pet. at 10; Exhibit at 36-38.) In particular, Saibu argues that the facts supporting the imposition of a consecutive sentence on the false imprisonment conviction in claim two should have been found by the jury because it was a separate crime that occurred during a single bank robbery. (Exhibit at 38.) Count two was related to the detention of Lucy Verduzco, a customer, during the August 13, 2005, Wells Fargo bank robbery, and Saibu was convicted in count three of robbery for that crime. (*Id.*) Petitioner contends the trial court erroneously stated that "[s]eparate bank robberies were committed at separate times and places therefore consecutive sentencing applies," but these comments only addressed consecutive sentences for different bank robberies and not for multiple crimes occurring during a single robbery. (*Id.*) Saibu argues that Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny required findings of fact to be "made by the jury for a consecutive sentence to be lawfully imposed for count two." (Exhibit at 38.)

Respondent counters that the California Court of Appeal's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. (Respt's Mem. at 21.) In support, Respondent cites Oregon v. Ice, 555 U.S. 160 (2009), in which the United States Supreme Court held that the Sixth Amendment does not require a jury determination of any fact declared necessary to the imposition of a consecutive sentence where a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, because the determination of facts underlying consecutive sentences lies outside the historical province of the jury and no "impelling reason" counsels in favor of abrogating the states' interest in providing rules to guide courts in making such determinations. (*Id.* at 22.)

1 Saibu raised this claim in a petition for review he filed in the California Supreme Court
 2 which was silently denied. (Lodgment No. 7, 8.) As before, this Court must “look through” to the
 3 California appellate court’s decision denying the claim. See Ylst, 501 U.S. at 801-06. That court
 4 summarized Petitioner’s claims as follows:

5 A. *Background*

6 Saibu was convicted of count 2 (§ 236) for the false imprisonment of Lucy
 7 Verduzco on August 13 and of count 3 (§ 211) for the robbery of the Wells Fargo
 8 Bank [] in east San Diego on that same date. The court imposed consecutive
 sentences for those convictions.

9 B. *Analysis*

10 Saibu asserts the consecutive sentence for count 2 should be modified to a
 concurrent term because Blakely required the jury to make the findings of fact
 required to impose a consecutive sentence for that count. As Saibu acknowledges,
 11 however, this court is bound by People v. Black (2007) 41 Cal.4th 799, 806 (Black
 12 II). (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) In Black
 13 II, the California Supreme Court held that discretionary imposition of consecutive
 sentences does not implicate a defendant’s Sixth Amendment rights. (Black II, supra,
 41 Cal.4th at p. 821.) The California Supreme Court explained: “The high court’s
 14 decision in Cunningham [v. California] (2007) 549 U.S. 270] does not call into
 question the conclusion we previously reached regarding consecutive sentences. The
 determination whether two or more sentences should be served in this manner is a
 15 ‘sentencing decision [] made by the judge after the jury has made the factual findings
 necessary to subject the defendant to the statutory maximum sentence on each
 16 offense’ and does not ‘implicate[] the defendant’s right to a jury trial on facts that are
 the functional equivalent of elements of an offense.’ [Citation.]” (Black II, supra, 41
 17 Cal.4th at p. 823, citing People v. Black (2005) 35 Cal.4th 1238, 1264 (Black I).
 Pursuant to Black II, we conclude the court did not violate Saibu’s federal
 18 constitutional right to a jury trial in imposing consecutive sentences.

19 (Lodgment No. 6 at 43-44.)

20 In a series of cases beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the
 21 Supreme Court declared that any fact, other than a prior conviction, that increases the sentence for a
 22 crime beyond the statutory maximum must be proved beyond a reasonable doubt or admitted to by
 23 the defendant. See Cunningham v. California, 549 U.S. 270, 274-75 (2007) (citing Apprendi, 530
 24 U.S. 466) and Blakely v. Washington, 542 U.S. 296, 303 (2004); see also United States v. Booker,
 25 543 U.S. 220 (2005).

26 In Cunningham, 549 U.S. at 274-75, the United States Supreme Court held that California’s
 27 determinate sentencing law (“DSL”) violated a defendant’s Sixth Amendment right to a trial by jury
 28 because it placed sentence-elevating fact-finding within the judge’s province. The Court stated that

1 California's sentencing scheme was unconstitutional to the extent it permitted imposition of upper
2 term sentences based on findings made by a judge, other than the fact of a prior conviction, under a
3 preponderance of the evidence standard, rather than by a jury beyond a reasonable doubt. Id.
4 Following Cunningham, the California Supreme Court vacated an earlier decision which held that
5 California's DSL was constitutional, and found that, "under the DSL[,], the presence of one
6 aggravating circumstance renders it lawful for the trial court to impose an upper term sentence." See
7 People v. Black, 41 Cal. 4th 799, 815 (2007) ("Black II"). The court in Black II, further held that
8 the "imposition of consecutive sentences does not violate a defendant's Sixth Amendment right to
9 jury trial." Id. at 821.

10 Petitioner acknowledges that this Court must follow Apprendi and its progeny, but argues
11 that, Black II was incorrectly decided with respect to the determination that Blakely does not "require
12 the jury to make findings of fact necessary to impose consecutive sentences under the Determinate
13 Sentencing Law (DSL) and the Rule of Court." (Exhibit at 34.) Instead, according to Petitioner, in
14 State v. Ice, 343 Or. 170 (Ore. S. Ct. 2007) the Oregon Supreme Court found that the imposition of
15 consecutive sentences violated the defendant's right to a jury trial under the Sixth Amendment
16 reasoning that Apprendi, Blakely, and Booker, established "the right to a jury trial respecting
17 whatever factors a legislature has identified as permitting the enhancement of an otherwise
18 statutorily limited sentence." (Id.)

19 Petitioner's argument is unavailing. In Ice, the United States Supreme Court reversed the
20 holding in State v. Ice, 343 Or. 170, upon which Petitioner relies in support of his argument that
21 Black II was incorrectly decided. Ice, 555 U.S. at 172. After being convicted of two counts of
22 burglary and four counts of sexual assault for entering the home of an 11-year old girl, the defendant
23 in Ice received two convictions for burglary, and a consecutive term for sexual assault added to each
24 of the burglary sentences. Id. at 166. The Oregon Supreme Court reversed, holding that Apprendi
25 applied because imposing consecutive sentences increased the total number of years the defendant
26 would be imprisoned. Id. In overturning the state court's decision, the United States Supreme
27 Court determined that "historical practice and respect for state sovereignty" counseled against
28 extending the rule in Apprendi to consecutive sentencing, and held that the Sixth Amendment allows

1 judges, rather than juries, to find facts necessary to the imposition of consecutive sentences for
2 multiple offenses. Id. at 168.

3 Here, the Court of Appeal's affirmation of the trial court's sentencing determination
4 pursuant to Black II did not violate Petitioner's right to a jury trial by imposing consecutive
5 sentences. Instead, the appellate court was in accord with Ice when it noted that the decision to
6 impose consecutive terms is within the trial judge's discretion "after the jury has made the factual
7 findings necessary to subject the defendant to the statutory maximum sentence on each offense" and
8 does not "implicate[] the defendant's right to a jury trial on facts that are the functional equivalent of
9 elements of an offense.'" (Lodgment No. 6 at 44, citing Black II.) Because the Court of Appeal's
10 decision was consistent with Ice, the adjudication of this claim by the state court was neither
11 contrary to, nor involved an unreasonable application of, clearly established federal law, nor was it
12 based on an unreasonable determination of the facts. Williams, 529 U.S. at 412-13. For the
13 foregoing reasons, Petitioner is not entitled to relief on this claim and relief is **DENIED**.

14 **V. CONCLUSION AND ORDER**

15 For the foregoing reasons, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas
16 Corpus is **DENIED**.

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18 DATED: August 5, 2011

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21 **CATHY ANN BENCIVENGO**
22 United States Magistrate Judge
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